IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

CARLA HAMMONDS, Plaintiff

v. No. 2:98CV204-B

FITZGERALD'S MISSISSIPPI, INC.,
d/b/a FITZGERALD'S CASINO/HOTEL, Defendant

O P I N I O N

This matter is presently before the court on the parties' motions for summary judgment. Plaintiff contends that the defendant is vicariously liable for sexual harassment of the plaintiff because of the admission of its Rule 30(b)(6) representative, Kathleen C. Bryant, that such harassment occurred, and because the facts are undisputed that plaintiff suffered a tangible adverse employment action. Defendant contends that it is entitled to summary judgment because plaintiff has failed to show a tangible employment action resulting from the harassment.

The parties in the above entitled action have consented to trial and entry of final judgment by the United States Magistrate Judge under the provisions of 28 U.S.C. §636(c), with any appeal to the Court of Appeals for the Fifth Circuit.

FACTS

Plaintiff was hired by the defendant casino in April 1997, as a supervisor in the slot machines department (slots supervisor). At a company picnic in July 1997, plaintiff met Bruce Nelson, Director of the Management Information Systems Department (MIS), and shortly there-after she began having drinks and meals with Nelson. In October 1997, Nelson promoted plaintiff to the position of junior programmer in MIS, a position for which plaintiff was not qualified and in which she performed little, if any, meaningful work.

Prior to the job promotion, which plaintiff and Nelson celebrated by drinking champagne in Nelson's automobile in the parking lot of the casino, plaintiff claims she was the object of unwanted sexual advances from Nelson. However, plaintiff admits she never reported any of Nelson's conduct to anyone in authority, nor did she avail herself of the remedies provided by

defendant's sexual harassment policy. Moreover, plaintiff continued to socialize with Nelson after work, although she acknowledges that at the time she knew he was married.

In November 1997, Tom Dashiell assumed responsibility for the MIS Department and decided that the junior programmer position was unnecessary and should be eliminated. Dashiell informed Nelson as early as January 1998 that the position should be eliminated, but for unex-plained reasons Nelson managed to delay the elimination of plaintiff's position until June 1998. At that time Nelson notified plaintiff that her job would probably be eliminated, but offered her another position in MIS at a lower rate of pay.

On June 24, 1998, plaintiff was at home with a migraine headache when Nelson called and advised her he needed to discuss her job with her. Al Coveney, a slot repair manager at Fitzgerald's and a friend of the plaintiff, was at her home when Nelson arrived, and remained there at her request until both he and Nelson departed around 10:00 p.m. During the visit, Nelson and plaintiff consumed several glasses of wine, even though the plaintiff had earlier taken Phenergan and Mepergan for her headache. According to plaintiff, alcohol helped the medication to "kick in." Plaintiff claims that later that evening, Nelson returned to her home and raped her while she was in a drug and alcohol induced stupor. Plaintiff reported the rape to Human Resources Director Betty Rossi on July 14, 1998, and Nelson was suspended the next day. Plaintiff did not work at the casino after July 14, 1998, and Nelson resigned effective July 31, 1998, after being given the option of resignation or termination.

LAW

The underlying question in this case is whether the plain-tiff suffered any employment discrimination forbidden by §703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1). Plaintiff contends that under the Supreme Court's holdings in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries v. Ellerth, 524 U.S. 742 (1998), all of the elements necessary to establish vicarious liability on the part of defendant for Bruce Nelson's misconduct have been met: (1) sexual harassment, (2) by a supervisor with authority over the

employee, (3) resulting in a tangible employment action. Plaintiff argues that she was sexually harassed throughout the time she spent in MIS and that she suffered a tangible employment action as defined in Ellerth: "[A} significant change in employment status, such as hiring, firing, failing to promote, reassign-ment with significantly different responsibilities, or a decision caus-ing a significant change in benefits." 524 U.S. at 761. Accordingly, plaintiff submits, she is entitled to recover, because she was harassed by Nelson and was terminated from her position as a junior programmer.

In determining whether an employer has vicarious liability when a supervisor creates a hostile work environment, the court is guided by principles of agency law, Ellerth, 524 U.S. at 754, as set out in the Restatement (Second) of Agency (1957). As the court explained in Ellerth, "Sexual harassment under Title VII presupposes intentional conduct" and "the Restatement defines conduct, including an intentional tort, to be within the scope of [the supervisor's] employment when 'actuated at least in part, by a purpose to serve the [employer],' even if it is forbidden by the employer." Id. at 756, citing Restatement §§228(1)(c), 230. The court, however, pointed out that the harassing supervisor frequently acts out of personal motives unrelated and even antithetical to the objectives of the employer. Nevertheless, the court observed that whether a supervisor's misconduct occurs within his scope of employment is not the only basis for determining employer liability under agency principles and that in limited circumstances, agency principles impose liability on employers even where employees commit torts outside the scope of employment. Id. at 758. Those principles, the court said, are set forth in §219(2) of the Restatement:

> "(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employ-ment, unless
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> "(a) the master intended the conduct or the conse-quences, or
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> "(b) the master was negligent or reckless, or
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> "(c) the conduct violated a non-delegable duty of the master, or
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> "(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

Id. at 758, quoting §219(2) of the Restatement.

Here, as in the Ellerth case, subsections (b) and (d) are possible grounds for imposing employer liability as a result of a supervisor's misconduct. Under subsection (b), an employer is liable when the tort is attributable to the employer's own negligence. 524 U.S. at 758-759, citing Restatement §219(2)(b). Under subsection (d), an employer may be held vicariously liable for intentional torts committed by an employee when the employee uses apparent authority or was aided in accomplishing the tort by the existence of the agency relation. Id.

In applying agency principles to a claim of harm caused by misuse of supervisory authority, the court adopted the following holding in Ellerth:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rules Civ. Proc. 8(c). The defense comprises two necessary elements (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
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> No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

524 U.S. at 765.

With the principles of Ellerth and the Restatement as our guiding lights, the court must determine whether vicarious liability can be imposed on defendant because of Nelson's sexual harassment of plaintiff.[1]

The undisputed facts reveal that Bruce Nelson was strongly attracted to plaintiff and that he granted her a promotion to a position for which she was not qualified, because

[1]For the purpose of the disposition of the parties' motions, the court presumes plaintiff's allegations regarding Nelson's misconduct as proven.

of his attraction to her. Following the promotion, Nelson made unwanted sexual advances toward plaintiff. However, plaintiff never reported any of Nelson's misconduct to the Director of Human Resources or anyone else designated by defend-ant's sexual harassment polity to receive such complaints. Furthermore, throughout the period of harassment, plaintiff continued to socialize with Nelson in public, creating the impression among co-workers that the two were on the friendliest of terms.

By January 1998, Tom Dashiell, Director of MIS, had made the decision to eliminate plaintiff's junior programmer position and instructed Nelson to communicate this information to the plaintiff. Nelson managed to avoid the unpleasant task of notifying plaintiff about the elimination of her job for approximately six months. It is, there-fore, undisputed that the elimination of plaintiff's job was not related to the harassment of plaintiff. Put another way, there was no causal connection between Tom Dashiell's decision to eliminate plaintiff's job and Bruce Nelson's sexual harassment of plaintiff. Accordingly, plain-tiff suffered no tangible employment action, as contemplated by Ellerth.

In defense of plaintiff's sexual harassment claim, defend-ant has offered undisputed proof that it promulgated a policy strictly forbidding sexual harassment and provided several avenues for reporting such misbehavior. It is also undisputed that plaintiff was fully aware of defendant's sexual harassment policy and the procedures for reporting same, but that she never availed herself of the relief provided by the policy. It is further undisputed that plaintiff's socializing with Nelson gave the appearance to co-workers that the two enjoyed a mutual friendship. It is undisputed that when the plaintiff reported to Human Relations the sexual assault by Nelson three weeks after it occurred, an extensive investigation was undertaken by defendant leading to the prompt resignation of Nelson under the threat of being fired. Thus, plaintiff has wholly failed to show that defendant failed to exercise reasonable care to prevent and correct the harassing behavior.

Plaintiff has offered no proof to rebut the affirmative defense raised by defendant. There is no evidence that could lead a rational trier of the facts to find for plaintiff. Accordingly, there is no genuine issue in this case for trial, Anderson v. Liberty Lobby, Inc., 477 U.S.

242 (1986), and summary judgment should be entered in defendant's favor. Scribner v. Socorro Independent School District, 169 F.3d 969 (5th Cir. 1999).

A separate order in accordance with this opinion shall issue this same date.

THIS, the 8th day of December, 1999.

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UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

CARLA HAMMONDS, Plaintiff

v. No. 2:98CV204-B

FITZGERALD'S MISSISSIPPI, INC.,
d/b/a FITZGERALD'S CASINO/HOTEL, Defendant

FINAL JUDGMENT

In accordance with an opinion entered this day, the parties in the above entitled action having consented to trial and entry of final judgment by the United States Magistrate Judge under the provi-sions of 28 U.S.C. §636(c), with any appeal to the Court of Appeals for the Fifth Circuit,

1. Plaintiff's Motion for Summary Judgment is hereby denied.

2. Defendant's Motion for Summary Judgment is hereby granted, and all of plaintiff's claims against Fitzgerald's Mississippi, Inc., d/b/a Fitzgerald's Casino/Hotel, are hereby dismissed with prejudice.

All memoranda, depositions, affidavits and other matters considered by the court in ruling on the motion for summary judgment are hereby incorporated and made a part of the record in this cause.

3. Each party shall bear its own costs.

SO ORDERED, this, the 8th day of December, 1999.

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UNITED STATES MAGISTRATE JUDGE

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FOR THE NORTHERN DISTRICT OF MISSISSIPPI
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O R D E R

By Order dated May 19, 1999, the court sustained plaintiff's Motion For Order Compelling Disclosures by Defendant Fitzgerald's. In response thereto the plaintiff submitted her itemization of fees and expenses incurred in bringing the motion in the amount of $1,143.19, and a hearing on the matter was set for February 1, 2000.

Defendant has not taken issue with the reasonableness of these expenditures of time, nor the rates sought by plaintiff's counsel. The court is therefore of the opinion that the hours itemized constitute a reasonable and proper expenditure of time on the matters above referred to, and that the hourly rate is well within the range of fees charged by competent attorneys for similar services in this district, and are therefore reasonable and proper.

In view of the court's ruling this date on defendant's motion for summary judgment, and that the plaintiff's itemization appears reasonable to the court and was supported by affidavit, the court is of the opinion that the hearing scheduled for February 1, 2000 is unnecessary and is therefore CANCELLED. Defendant shall pay to the plaintiff within ten days of this date, through her counsel of record, the sum of $1,143.19 as her fees and expenses incurred in bringing the motion to compel.

SO ORDERED, this the 8th day of December, 1999.

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UNITED STATES MAGISTRATE JUDGE

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O R D E R

Presently before the court in the above entitled action is plaintiff's Motion to Strike Certain Exhibits to Defendant's Motion for Summary Judgment, and defendant's response thereto.

The motion is GRANTED. These documents will not be considered in the disposition of the parties' summary judgment motions.

SO ORDERED, this the 8th day of December, 1999.

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UNITED STATES MAGISTRATE JUDGE